No. 191.

Brf. of Smith & Smith for Pl.

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Supreme Court of the United States.

(No. 191.)

O. T. 1900.

JETTA SIMON,
Plaintiff in Error,
VERSUS
JOHN N. CRAFT,
Defendant in Error.

BRIEF FOR THE PLAINTIFF IN ERROR.

GREGORY L. SMITH,
HARRY T. SMITH,
Attorneys for Appellant.

COMMERCIAL PTG. CO., MOBILE.

Supreme Court of the United States.

(No. 507.)

JETTA SIMON,

Plaintiff in Error,

VERSUS

JOHN N. CRAFT,

Defendant in Error.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The case was tried upon an agreed state of facts (Rec. p. 9) showing that the title to the property in controversy was in the plaintiff in error (plaintiff below); that certain proceedings were had, wherein she was declared a lunatic, and that, thereupon, a guardian *of her person and estate* was appointed, and that thereafter such guardian sold the property under certain proceedings, for that purpose, to which plaintiff in error was not a party; and defendant in error (the defendant below) claimed title under and through such sale.

It was conceded by plaintiff in error that if the proceedings to declare her a lunatic were such as to constitute due process of law, and authorized an adjudication that she was a lunatic, and the appointment of a guardian of her estate, the proceedings by such guardian to sell the prop-

erty in question were sufficient, and that defendant in error has a valid title to the property in controversy, but it was contended that, under the statutes of Alabama, a guardian of the estate of a lunatic could only be appointed under a judicial ascertainment of the existence of lunacy, and that if there was no valid adjudication of lunacy, there could be no valid appointment of a guardian, and, therefore, no valid proceedings by a guardian to sell property of an alleged lunatic.

The plaintiff in error concedes that if the attempted adjudication of lunacy was merely irregular, there would be nothing upon which this Court could review the decision of the Supreme Court of the State, but it is contended that said proceedings were absolutely void because not such as to constitute due process of law.

1st. Because the statutes of Alabama do not provide due process of law for such cases.

2nd. Because due process of law was not accorded appellant in the particular case under discussion.

a. In that appellant was deprived of an opportunity to be heard in said proceedings.

b. In that the tribunal that attempted to adjudicate appellant a lunatic never acquired jurisdiction.

THESE QUESTIONS WERE RAISED IN THE FOLLOWING MANNER:

After the plaintiff in error had shown title to the property in controversy to have been in her, the defendant in error sought to show that he had subsequently derived title from her, and for that purpose offered in evidence the record and proceedings under which he claimed that the plaintiff in error had been adjudged a lunatic, in connection with other evidence by which he deraigned title from, and under such proceedings. (Rec. p. 11-40.)

The plaintiff in error (plaintiff below) objected to the introduction of the records of the proceedings to declare her a lunatic, because they were void upon the following grounds, viz:

1st. In that there was no process issued notifying Jetta Simon to be present at the trial of the inquest of lunacy that was held.

2nd. In that no provision was made in or by said proceedings whereby Jetty Simon might be present at the inquest of lunacy that was held.

3rd. In that the writ of arrest issued for the body of Jetty Simon was conditional in form and conferred upon the sheriff the power to determine whether it should be executed or not.

4th. In that the writ of arrest left it to the judgment of the sheriff whether the said Jetty Simon should be allowed to appear at the trial of the inquest of lunacy.

5th. In that the writ of arrest authorized the sheriff to restrain Jetty Simon of her liberty and deprived her of the opportunity to be heard at the inquest of lunacy.

6th. In that the sheriff's return shows that under the writ of arrest he restrained Jetty Simon of her liberty and did not permit her to be present at the trial of the inquest of lunacy.

7th. Because the statute under which Jetty Simon was restrained of her liberty and deprived of her property is in conflict with Article V,—the amendment to the Constitution of the United States, which provides, "Nor be deprived of life, liberty or property without due process of law," and in conflict with Article XIV, amendment to said Constitution.

1 a. In that it authorizes a citizen to be deprived of his or her liberty without due process of law.

2 a. In that it authorizes a citizen to be deprived of his or her property without due process of law.

8th. Because said proceedings in the Probate Court are irrelevant and immaterial to any issue in the cause.

The Court overruled the objections of the plaintiff in error to said proceedings; to such ruling of the Court the plaintiff in error then and there excepted. (Rec. p. 40.)

At the conclusion of the case plaintiff in error (plaintiff below) asked the court to give the jury a peremptory charge to find a verdict for her; the court refused this request, and gave the jury a peremptory charge to find a verdict for the defendant, and the plaintiff in error (plaintiff below) reserved an exception to each of these rulings of the court. (Rec. p. 41.)

The case was appealed to the Supreme Court of the State, and was there affirmed, and this appeal is taken from the decision of the Supreme Court of the State and error duly assigned to the decision upon the several grounds pressed in the lower court. (Rec. pp. 58, 59, 60, 61 and 62.)

SPECIFICATION OF ERRORS RELIED UPON.

The errors assigned and relied upon may be classified and reduced to the following, viz:

The Supreme Court of Alabama erred

1. In deciding that the statutes of Alabama provide due process of law for the inquest of lunacy and in not holding that such statutes fail to provide due process.

2. In deciding that due process of law was accorded appellant in the inquisition involved in this case, and in not deciding that such proceedings did not constitute due process of law.

a. Because the plaintiff in error was deprived of an opportunity to be heard in said proceedings.

b. Because the tribunal that attempted to adjudicate plaintiff in error a lunatic never acquired jurisdiction.

These propositions are assigned upon the record in the following form:

1st. That the Supreme Court of Alabama erred in deciding that the said record and proceedings of the probate court of Mobile county, Alabama, in the matter of the inquisition of lunacy against the plaintiff in error were admissible in evidence against her.

2nd. That the Supreme Court of Alabama erred in deciding that the said proceedings in the probate court of Mobile county, by which the plaintiff in error was declared a lunatic, could not be collaterally impeached.

3rd. That the Supreme Court of Alabama erred in holding that the said proceedings in the probate court of Mobile county, by which the plaintiff in error was declared a lunatic, were supported by the service of due process of law as against the plaintiff in error.

4th. That the Supreme Court of Alabama erred in deciding that the decree of the probate court of Mobile county appointing Ralph G. Richards as the guardian of the plaintiff in error was valid and binding as against the plaintiff in error.

5th. That the Supreme Court of Alabama erred in deciding that the probate court of Mobile county had jurisdiction to appoint Ralph G. Richards as the guardian of the plaintiff in error.

6th. That the Supreme Court of Alabama erred in deciding that the said record and proceedings of the probate court of Mobile county, in the matter of the petition of Ralph G. Richards for the sale of the real estate which is the subject matter of this suit *was* admissible evidence against the plaintiff in error.

7th. That the Supreme Court of Alabama erred in deciding that the deed which was executed by Ralph G. Richards on the 11th day of May, 1899, to Henry J. Simon, operated to divest the title of the property in question out of

the plaintiff in error.

8th. That the Supreme Court of Alabama erred in holding that the proceedings had in the probate court of Mobile county for the sale of the real estate in question and the decree authorizing said sale under which Ralph G. Richards conveyed the property in question to Henry J. Simon *was* not void for want of due process of law as against the plaintiff in error.

9th. That the Supreme Court of Alabama erred in holding that the circuit court of Mobile County did not err in charging the jury as follows: "If the jury believe all of the evidence in the case, they ought to find a verdict for the defendant."

10th. That the Supreme Court of Alabama erred in holding that the circuit court of Mobile County did not err in refusing the written request of the plaintiff in error to charge the jury: "If the jury believe all of the evidence in the case, they ought to find a verdict for the plaintiff for the lands described in the complaint."

11th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error first objection "to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law."

12th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error second objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that there was no process issued notifying Jetty Simon to be present at the trial of the inquest of lunacy that was held."

13th. That the Supreme Court of Alabama erred in de-

ciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error third objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that no provision was made in or by said proceedings whereby said Jetty Simon might be present at the inquest of lunacy that was held."

14th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error fourth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the writ of arrest issued for the body of Jetty Simon was conditional in form and conferred upon the sheriff the power to determine whether it should be executed or not."

15th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error fifth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the writ of arrest left it to the judgment of the sheriff whether the said Jetty Simon should be allowed to appear at the trial of the inquest of lunacy."

16th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error sixth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the writ of arrest authorized the sheriff to restrain Jetty Simon of her liberty and deprived her of the opportunity to be heard at the inquest of lunacy."

17th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error seventh objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "in that the sheriff's return shows that under the writ of arrest he restrained Jetty Simon of her liberty and did not permit her to be present at the trial of the inquest of lunacy."

18th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error eighth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic because said proceedings did not constitute due process of law, "because the statute under which Jetty Simon was restrained of her liberty and deprived of her property is in conflict with Article V—the amendment to the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law, and in conflict with Article XIV of the amendment to said Constitution.

a. In that it authorizes a citizen to be deprived of his or her liberty without due process of law.

b. In that it authorizes a citizen to be deprived of his or her property without due process of law.

19th. That the Supreme Court of Alabama erred in deciding that the circuit court of Mobile county did not err in overruling the plaintiff's in error ninth objection to the proceedings had in the probate court of Mobile county to decree the plaintiff in error a lunatic, "because said proceedings in the probate court are irrelevant and immaterial to any issue in the cause." (Rec. pp. 60, 61 and 62.)

ARGUMENT.

I.

THE PROCEEDINGS BY THE ALLEGED GUARDIAN TO SELL THE PROPERTY IN CONTROVERSY NECESSARILY DEPEND, FOR THEIR VALIDITY, UPON THE VALIDITY OF THE PROCEEDINGS IN THE INQUEST OF LUNACY.

The plaintiff in error was not a party to the proceedings by the guardian to sell the property in question; such proceedings proceeded upon the theory that she had been duly adjudged a lunatic, and that petitioner had been duly appointed the guardian of her person, and her estate, and that she was therefore represented by him. (See proceedings, Rec. pages 27 to 40); these proceedings must, therefore, necessarily depend, for their validity, upon the validity of the proceedings under which the plaintiff in error was declared a lunatic, and the petitioner appointed her guardian; as independent proceedings, they were void, because the plaintiff in error was not a party to them, and was not served with notice of them.

Scott vs. McNeal, 154 U. S., 34.

Molton vs. Henderson, 62 Ala., 426-430.

This proposition has always been conceded by both counsel and court.

THE STATUTE OF ALABAMA PROVIDING FOR AN INQUISITION OF LUNACY DOES NOT AFFORD THE ALLEGED LUNATIC AN OPPORTUNITY TO BE HEARD, AND AUTHORIZES AN ADJUDICATION AFFECTING BOTH PERSONAL LIBERTY AND THE RIGHTS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Under these statutes, the alleged lunatic may, or may not, be allowed an opportunity to appear and defend the charge of lunacy brought against her; if allowed such op-

portunity, she would not be heard to complain, but in this case the writ directed the sheriff to take plaintiff in error into custody, and did not require him to have her present at the trial, but authorized him to determine whether it was consistent with her health and safety to be present at such trial, and he determined this question against her without giving her any opportunity to be heard, and, in fact, without any hearing, and retained her in custody, and did not allow her to be present at the inquest of lunacy. The statute has then operated to deprive plaintiff in error of her liberty and property without a hearing, and if the proceedings are justified by the statute, then the statute is in conflict with the Constitution of the Unied States in that it authorizes citizens to be deprived of their liberty and property without due process of law, and the case presented is a proper one to be reviewed by the Supreme Court of the United States.

THE STATUTE.

The statute provides that upon the filing of a petition for an iquisition of lunacy, a writ be issued, "directed to the sheriff *to take* the person alleged to be of unsound mind, and *if consistent with his health or safety,* have him present at the place of trial;" it provides no method by which the person taken can appear, or obtain a hearing, if the sheriff declares that it is not consistent either with his safety or with his health for him to appear, nor does it provide any method by which the sheriff shall determine this all important question, but authorizes an adjudication depriving the alleged lunatic, both of his liberty and his property in his absence, and without his having any opportunity to be heard, upon the mere return of the sheriff, that it is not consistent with the safety or health of the alleged lunatic to be present at his trial. This does not constitute

due process of law, because it affords no opportunity to be heard.

The statutes authorizing such proceedings are as follows:

SECTIONS OF THE CODE OF 1886 IN FORCE AT THE TIME OF THE PROCEEDINGS IN QUESTION.

(Code of 1886.)

2390, (2753, 2754). APPOINTMENT.—The court of probate has authority and it is a duty to appoint guardians for persons of unsound mind residing in the county, having an estate, real or personal, and of persons of unsound mind residing without the State, having within the county property requiring the care of a guardian, under the limitations, and in the mode hereinafter prescribed.

2391. GUARDIAN NOT APPOINTED UNTIL AFTER INQUISITION.—A guardian for a person alleged to be of unsound mind, residing in the county, must not be appointed until an inquisition has been had and taken as hereinafter directed.

2392. (2757). INQUISITION PROCEEDINGS.—Upon the petition of any of the relatives or friends of any person alleged to be of unsound mind, setting forth the facts and name, sex, age and residence of such person, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the court of probate of the county in which such person alleged to be of unsound mind resides, must appoint a day, not more than ten days from the presentment of such petition, for the hearing thereof.

2393. (2758). JURY SUMMONED; WRIT OF ARREST. The judge of probate must issue a writ directed to the sheriff, commanding him to summon twelve disinterested persons of the neighborhood for the trial thereof; and also

issue subpœnas for witnesses, as the parties may require, returnable to the time of trial; he must also issue a writ directed to the sheriff to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial.

2394. (2759). OATH OF JURORS; VACANCIES FILLED. At the time set for the trial, if good cause be not shown for continuance, the jury must be impanelled and sworn well and truly to make inquisition of the facts alleged in the petition, and a true verdict rendered according to the evidence. If any of the jurors are excused from serving, fail to attend, or are set aside for any cause, their places may be supplied from the bystanders.

2395. (2760). ON VERDICT OF INSANITY, PAPERS FILED AND GUARDIAN APPOINTED.—If the jury find by their verdict that the facts alleged in the petition are true, and that such person is of unsound mind, the court must cause the petition, and all the proceedings thereon to be recorded, and appoint a suitable guardian of such person.

What constitutes due process of law is fully discussed under the next proposition in this brief, and as the legal principles there discussed are equally applicable to the question here presented, we will merely refer to them as applicable to the matter here in hand.

III.

DUE PROCESS OF LAW WAS NOT ACCORDED PLAINTIFF IN ERROR IN THE INQUISITION OF LUNACY PROCEEDINGS IN THAT SHE WAS DEPRIVED OF AN OPPORTUNITY TO BE HEARD.

The inquisition of lunacy was commenced by a petition filed by one Ralph Richards in the probate court of Mobile county, alleging that plaintiff in error was a lunatic; upon the filing of the petition the judge of probate made an order

fixing a day to hear the matter, and further ordering "that a writ be issued to said sheriff requiring him to take the said Jetty Simon *so that he have her in this court to be presented at said trial if consistent with the health and safety of said Simon.* The writ that was issued did not, however, pursue the terms of the order, but, after reciting the proceedings, directed the sheriff as follows:

"Now, therefore, *if it be consistent with the health and safety of said Jetty Simon, you are hereby required to take her body, so that you may have her in said court, to be present at said trial, and before the jury then to be empannelled to make said inquisition.*"

The sheriff did not obey the letter of the writ, *but took the body of plaintiff in error, and did not have her present at the trial,* but made return that he did not have her there, because it was inconsistent with her safety or health to do so, and *the court proceeded to adjudicate her a lunatic, while she was absent and in the custody of the sheriff, and was thereby prevented from being present.*

These proceedings are set forth in the Record, pp. 19-25, and, omitting, as immaterial, the names of the jurors in the writ, directing the sheriff to summon a jury, his return thereon, and the bond which was executed by Richard for the faithful performance of his duties as guardian, were as follows:

PROCEEDINGS:

IN RE JETTY SIMON, A PERSON OF UNSOUND MIND,

PETITION FOR INQUISITION OF LUNACY.

The State of Alabama, }
Mobile County. }

IN PROBATE COURT, MOBILE COUNTY.

To the Honorable Price Williams, Judge of said Court:

Your petitioner, Ralph G. Richards, respectfully repre-

sents unto your honor that he is a friend to one Jetty Simon and of her family; that said Jetty Simon is a female of the age of forty-nine years, and resides in Mobile, and is of unsound mind and incapable of governing herself or of conducting and managing her affairs.

Wherefore your petitioner prays your honor to take cognizance of the matter of this his petition and appoint a day for hearing the same, and that such proceedings may be had as shall be necessary and proper to determine according to law in such case whether or not the said Jetty Simon is a person of unsound mind.

RALPH G. RICHARD.

The State of Alabama, }
Mobile County, }

Before me personally appeared Ralph G. Richard, who, being duly sworn, deposes and says that he is fully informed of the allegations contained in the foregoing petition, and that he believes the same to be true, as therein stated.

RALPH G. RICHARD.

Sworn to and subscribed before me this 29th day of January, 1889.

HENRY HANAW,
Notary Public, Mobile Co., Ala.

Filed January 31st, 1889.

THOMAS KIERNAN, Clerk.

The verdict of the jury, endorsed upon the back of said petition, is as follows, viz:

"We, the jury, find Mrs. Jetty Simon, to be of unsound mind.

JOHN POLLARD, JR., Foreman."

JETTY SIMON, an Alleged Lunatic.

January 30th, 1889.

This day came Ralph G. Richard, and filed his petition in due form and under oath, alleging that said Jetty Simon, a female resident of this county and of age, is of unsound mind and incapable of taking care of herself or of managing her affairs, and praying that the necessary proceedings may be had so as to have due inquiry and determination as to the truth of said allegation. It is therefore ordered that the 6th day of February, 1889, be appointed as a day for the hearing of said petition, and that a jury be drawn, as the law directs, for the trial of this issue. It is further ordered that a writ be issued to said sheriff requiring him to take the said Jetty Simon so that he have her in this court to be presented at said trial if consistent with the health and safety of said Simon.

IN THE MATTER OF JETTY SIMON, ALLEGED *NON COMPOS MENTIS*,

WRIT.

The State of Alabama, }
Mobile County. }

In Re PROBATE COURT.

To the Sheriff of said County:

Whereas, Ralph G. Richard, as the friend of one Jetty Simon, hath this day filed his petition with the judge of said court, alleging that said Jetty Simon is a female lunatic, of the age of forty-nine years, and a resident of this county, and praying that an inquisition of lunacy may be made and had in due form of law to try the truth of said allegations and as—whether the said Jetty Simon is incapable of governing herself and of attending to her affairs; and whereas the judge of said court has by due order en-

tered in the premises appointed the sixth (6th) day of February, 1889, for hearing said petition and for the due trial thereof:

Now, therefore, if it be consistent with the health and safety of said Jetty Simon, you are hereby required to take her body, so that you may have her in said court, to be present at said trial, and before the jury then to be empannelled to make said inquisition.

And have you then and there this writ with your return thereon as to how you have executed the same.

Witness, Price Williams, Jr., as judge of said court, at office in the City of Mobile, this the 30th day of January, A. D., 1889.

PRICE WILLIAMS, JR., Judge.

Received January 31st, 1889, and on the same day I executed the within writ of arrest by taking into my custody the within named Jetty Simon and handing her a copy of said writ, and as it is inconsistent with the health or safety of the within named Jetty Simon to have her present at the place of trial, and on the advice of Dr. H. P. Hirshfield, a physician whose certificate is hereto attached, she is not brought before the honorable court.

W. H. HOLCOMBE, Sheriff.
By WM. H. SHEFFIELD, D. S.

Mobile, February 5th, 1889.

IN THE MATTER OF JETTY SIMON, ALLEGED *NON COMPOS MENTIS.*

CERTIFICATE OF PHYSICIAN.

Mobile, Ala., January 30th, 1889.

To the Sheriff of Mobile County, Ala.:

I, H. P. Hirshfield, a regular physician, practicing in Mobile County, Ala., hereby certify that I am acquainted

with Mrs. Jetty Simon, and have examined her condition on yesterday and find that she is a person of unsound mind, and it would not be consistent with her health or safety to have her present in court in any matter now pending.

H. P. HIRSHFIELD, M. D.

Probate Court, February 6th, 1889.

JETTY SIMON, ALLEGED *NON COMPOS MENTIS*, ESTATE OF.

The State of Alabama, }
Mobile County. }

In the matter of petition to enquire into her lunacy.

To Fielding Vaughan, Esquire:

You are hereby notified that you have been appointed guardian *ad litem* of Jetty Simon, alleged *non compos mentis*, interested in a certain matter and proceeding in said court, entitled as appears in the caption hereof, and which comes up for hearing on the sixth day of February, A. D., 1889.

Witness, Price Williams, Jr., Judge of said court, at office, the sixth day of February, A. D., 1889.

Attest: FRANCIS KIERNAN, Clerk.

February 6th, 1889.

I hereby accept service of the above notice, and consent to act as guardian *ad litem* for Jetty Simon.

FIELDING VAUGHAN.

Filed Feb'y 6, '89.

P. WILLIAMS, Jr., Judge.

IN THE MATTER OF THE PETITION OF RALPH G. RICHARD TO DECLARE MRS. JETTY SIMON *NON COMPOS MENTIS.*

Answer of Fielding Vaughan, guardian *ad litem* for said Simon.

This day comes Fielding Vaughan, and as guardian *ad litem* for Jetty Simon, an alleged lunatic, for answer to the petition of Ralph G. Richard, says that he wholly denies all the matters and things stated and contained in said petition, and requires strict proof to be made thereof according to law.

February 6th, 1889.

FIELDING VAUGHAN,
Guardian *ad litem* for Jetty Simon.

Filed February 6, 1889.

P. WILLIAMS, JR., Judge.

JETTY SIMON, Lunatic.

The State of Alabama, }
Mobile County. }

Probate Court of said County.

February 6th, 1889.

This being the day appointed by reference to an entry thereof made upon the minutes of the court on the 30th of January, 1889, for the hearing of the petition, Ralph G. Richards, filed, alleging the lunacy of the said Jetty Simon, and praying an inquisition thereof, and it being shown that it would not be consistent with the health and safety of said lunatic to bring her into court at this time, and it appearing that due process had been served upon said luna tic notifying her of this proceeding, now comes the said Richard and a jury of good and lawful men, who reside in

the county of Mobile, and who, having been summoned, to-wit: John Pollock, Jr., and eleven others, who, having heard the evidence, the arguments of counsel, and the charge of the court in the premises, and being first duly tried, empannelled, and sworn well and truly to make inquisition of the facts alleged in said petition, and a true verdict to render according to the evidence, upon their oath say: "We, the jury, find Mrs. Jetty Simon, to be of unsound mind."

It is ordered, adjudged and decreed by the court that said petition, and all other petitions thereon, together with the aforesaid verdict of said jury declaring the said Jetty Simon a lunatic be recorded.

JETTY SIMON, *Non Compos Mentis*, Estate of,

APPOINTMENT OF GUARDIAN.

February 11th, 1889.

This day comes Ralph G. Richard and applies for letters of guardianship over the estate of said lunatic, and he now entering into bond and security in the sum of $7,000.00 with H. J. Simon and M. Goldstein as his sureties, which bond, with said securities, has been taken and approved by the judge of this court, it is ordered and decreed that letters of guardianship over the estate of said Jetty Simon, lunatic, issue to Ralph Richard.

The State of Alabama, }
Mobile County. }

Whereas, on the eleventh (11th) day of February, 1889, Ralph G. Richard was by the honorable the probate court of Mobile county, State of Alabama, appointed guardian over the person and estate of said Jetty Simon, *non compos*

mentis, and the said Ralph G. Richard having complied with the requisites of the law in such cases made and provided, these are therefore to give said Ralph G. Richard, in whose fidelity in this behalf we very much confide, full power and authority to demand, receive, and secure, all and singular, the estate and all debts, dues and demands whatsoever to said minor belonging, and to do all other acts and things concerning said guardianship in as full and complete a manner as if the same was herein particularly expressed.

Witness, Price Williams, Jr., judge of said court, this 11th day of February, 1889.

P. WILLIAMS, JR., Judge.

It plainly appears from these proceedings that the plaintiff in error was taken into custody and not allowed to be present at the trial of the inquisition of lunacy.

THE LEGAL QUESTION TO BE DETERMINED IS WHETHER THERE CAN BE DUE PROCESS OF LAW, WHERE A PERSON IS DEPRIVED OF THE RIGHT TO BE PRESENT AND HEARD IN A PROCEEDING BY WHICH SHE IS DEPRIVED BOTH OF HER LIBERTY AND PROPERTY.

Speaking of this precise question, in the case of Windsor vs. McVeigh, 93 U. S., page 278, Mr. Justice Field observed:

"The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial in such a case to a party of the right to appear is in legal effect the recall of the citation to him." Again, on page 277, quoting from the case of McVeigh vs. United States, 11 Wallace, page 267, Justice Field says: "The order in effect denied the respondent a hearing. It is alleged that he was in the

position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

Proceeding to comment upon this language, Mr. Field says: "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceedings had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard," and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard."

The suggestion contained in the opinion of the majority

of the Supreme Court of Alabama (Record p. 48) that the inquisition of lunacy was in the nature of a proceedings *in rem*, and that jurisdiction attached upon the filing of the petition to have Mrs. Simon declared a lunatic, *and that all other* defects in the proceedings constituted mere irregularities and could not be reached upon collateral attack, was not intended to refer to an omission of the service of due process of law so as to bring the alleged lunatic before the court to defend, but if it be so understood, it is fully answered by the case of

Windsor vs. McVeigh, 93 U. S., 278,

and those of

Scott vs. McNeal, 154 U. S., 46,
Bradstreet vs. Nep. Ins. Co., 3 Sumner, 601,
Same case, Federal cases, No. 1793.

Speaking of this contention, Mr. Justice Field says, 93 U. S., page 279: "A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner in person or by agent, and that its seizure will, therefore operate to impart notice to him. Where notice is given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings beyond that arising

from the seizure, prescribing the time within which the appearance must be made, is essential. * * * * * * * The manner of the notification is immaterial, but the notification itself is indispensible."

In the case of Bradstreet vs. Neptune Insurance Co., 3rd Sumner, 601 (S. C. Fed. Cases No. 1793), Judge Story, after pointing out at some length, the necessity for an opportunity of hearing in cases *in rem*, proceeded: "It is a rule found in the first principles of natural justice that a party shall have an opportunity to be heard in his defense before his property is condemned, and the charges on which the condemnation is stated shall be specific, determinate and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, *so that the parties in interest have no opportunity of appearing and making a defense*, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of the judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more in common sense and in common honesty, than the sentence of the tribunal which first punishes and then hears the party,—*castigatque, auditque.*"

It seems, therefore, too clear for argument that the denial of an opportunity to be heard is in effect a denial of notice of the proceedings and that an opportunity to be heard is made necessary by constitutional requirements as to due process of law.

In the case of Smith against Woolfolk, 115 U. S., page 149, the Supreme Court of the United States spoke as plainly upon this subject as language will permit, when it said: "For the decree of a court rendered against a party who has not been heard, *and has had no chance to be heard,*

is not a judicial determination of his rights, and is not entitled to respect in any other court."

In the case of Fallbrook Irrigation District vs. Bradley, 164 U. S., page 172, the court said: "*The obvious purpose of publication of the notice of the intended presentation of the petition is to give to those who are in any way interested in the proceeding*, an opportunity to appear before the board and be heard upon all the questions of fact, including the question of benefits to lands described in the petition."

In the case of McVeigh vs. U. S., in the 11 Wallace, page 267, the court said: "The order in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and the right administration of justice."

In the case of Lent vs. Tillson, 140 U. S., page 327, the court, quoting from the case of Hagar vs. Reclimation District in 111 U. S., page 701-8, it was said: "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings which imply that the party to be affected shall have notice *and an opportunity to be heard;* so also where the title or possession of property is involved."

In the case of Hagar against the Reclimation District No. 108, reported in 111 U. S., page 708, the court said: "It is sufficient to observe here that by 'due process' is meant one which following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted t the ends to be attained; and whenever it is nec-

essary for the protection of the parties, it must *give them an opportunity to be heard respecting the justice of the judgment sought.* The clause in question means, therefore, that there can be no proceedings against life, liberty or property, which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

The same general principles are fully reviewed in the cases of

Pennoyer vs. Neff, 95 U. S., 714;

and in

St. Clair vs. Cox, 106 U. S., 350.

In the case of Burns vs. Mulnomah Railroad Company, 15 Fed. 183, the court, speaking of due process of law as required by the Fourteenth amendment, observed: "And this, it is generally agreed, includes at least legal notice of the proceeding and a prescribed opportunity to be heard upon the question involved therein."

In the Railroad Tax cases, 13 Fed., page 751, Justice Field observed: "There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording *him an opportunity of being heard* respecting the correctness of their action. * * * * * It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property, without an opportunity of being heard against the proceeding. The principle is as old as the Magna Charta, and is embodied in all of the state constitutions, and in the Fourteenth amendment of the Federal Constitution."

Nowhere is the fact that the constitutional guaranty of due process of law confers an absolute right, on the person

proceeded against, to be present at the hearing, more clearly enunciated than in Alabama. In the case of

Zeigler vs. S. & N. Ala. R. R. Co., 58 Ala., 599,

it is said: "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved." In the case of

Calhoun vs. Fletcher, 63 Ala., 584-5,

the court, citing Cooley's Constitutional Limitations, pages 368-69, said:

"In judicial investigations, the law of the land requires an opportunity for a trial; there can be no trial if only one party is suffered to produce his proofs."

From these authorities, it is perfectly clear, as it would be without any authority, that the proceedings of lunacy which were conducted in the probate court, while Mrs. Simon remained in the custody of the sheriff, and was by him, under the writ in this very cause, physically restrained from appearing, could not properly be dignified with the name of judicial proceedings.

It would hardly be contended that in proceedings, in any civil cause involving property, it would constitute due process of law to arrest and imprison the defendant under a writ issued in the cause, and at the same time notify him of the time and place of trial, and then keep him in custody, and not allow him to attend the trial; unless, therefore, there is a distinction between the inquisition of lunacy and all other civil proceedings, our statute, if it authorized the proceedings had in this cause, and the proceedings themselves, whether authorized by the statute, or not, conflicted with and violated the Fourteenth amendment of the Constitution of the United States.

AN INQUISITION OF LUNACY IS A JUDICIAL PROCEEDING TO WHICH THE PROVISIONS OF THE FEDERAL CONSTITUTION AS TO DUE PROCESS OF LAW ARE APPLICABLE.

The attorney for the defendant in error argued in the court below that an inquisition of lunacy is a "judicial proceeding" constituting a cause in court; this is admitted. There is an abundance of authority in the United States for the proposition that an inquisition of lunacy is in the nature of a judicial proceeding against the liberty and property of the alleged lunatic, in which his right to notice and an opportunity to be heard is guaranteed by the Fourteenth amendment to the Constitution of the United States.

Defendant in error contends that an inquisition of lunacy under the statutes of Alabama partakes of the nature of the common law proceedings, and that, under the common law, no notice to the alleged lunatic was required. It is not material whether notice was required at common law, or not. The Federal Constitution expressly requires notice and an opportunity to be heard before condemnation in every proceeding against the life, liberty or property of a citizen, and this guaranty is not, like that of the right to trial by jury, limited to cases where the right existed at common law, but we think the contention as to the proceedings at common law inaccurate.

COMMON LAW INQUISITION OF LUNACY.

The whole proceeding of lunacy, at common law, appears to have grown out of the Statute Seventeen, Edward the Second, conferring on the king as *parens patriae,* the power to take care of the property of lunatics and idiots; as to the former as mere trust, as to the latter as a trust coupled with an interest. In consequence of the oppressive conduct

of the Escheators, whose office it was to make inquiries concerning any matter, which gave the king a right to the possession of the lands, tenements, or chattels, it became necessary to provide that no seizure should be made into the king's hands, without office found.

Shelford on Lunatics, page 74-5.

Thus it was that occasion arose for the issuance by the Lord Chancellor, of what was known as the "Commission of Lunacy," the purpose of which was to enquire as to whether or not the alleged lunatic was, in fact, *non compos mentis*, or as to whether it was necessary that a notice of the issuance of his commission should be served upon the party alleged to be insane.

Lord Chancellor Erskine, in the case of

Ex parte Cranmer, 12 Vesey, 455,

declared: "The party certainly must be present at the execution of the commission. It is his privilege."

In the case of

Heli, 3rd Atkyns, 635,

the Lord chancellor declared: "That though a man be found an idiot by inquisition taken before the sheriff, and by their examination, and that be returned into the Chancery, yet he who is so found idiot may in person, or by his friends, come into Chancery before the Chancellor, and show the matter and pray that he may be examined before the Chancellor, whether he be idiot or not, and if upon such examination he be found no idiot, then in the inquisition found before the sheriff, and also the examination which the sheriff hath made and returned thereupon, shall be of no effect, but the same office shall be taken as void without any other traverse."

Mr. Shelford, in his work on Lunatics, page 100, expresses the same opinion thus: "The supposed lunatic, himself, has the right to be present at the execution of the

commission." It is to be observed, however, that the issuance of this commission was only, in effect, the appointment of a board of reviewers. Mr. Shelford, on page 101 of his work on Lunacy, explains that the proceedings upon the inquest of office, was an *ex parte*, proceeding, *and was not conclusive.* In other words, the proceedings of the commission was in the nature of an investigation before the grand jury and determined, not whether the party was a lunatic, but whether the government should maintain that he was so, and put him to a trial of the matter. It seems that at a very early date in the history of England, it was regarded as discretionary with the Lord Chancellor whether the alleged lunatic upon the inquest of office should be allowed the opportunity of traversing the inquest of lunacy, but, however this may have been, it was by the statute of the Second and Third Edwards the Sixth, chapter eight, Sec. Six (2 Inst. page 688) provided that every alleged lunatic, aggrieved by any such office or inquisition, "Shall and may have his or her traverse to the same immediately or after his or their pleasure, and proceed to the trial therein, and have like remedy and advantages as in other cases of traverse upon untrue inquisition of office founden; any law. usage or custom to the contrary in anywise, notwithstanding."

Upon the construction of this statute the authorities in England are conflicting, and for a long time the interpretation of the act was in doubt, but it seems now to be settled that the statute makes the traverse of inquisition a matter of right.

Ferne *ex parte*, 5 Vesey, 832.
Ex parte Wragg, 5 Vesey, 450.
Wards *ex parte*, 6 Vesey, 579.
Ex parte Hall, 7 Vesey, 260.
Serwood vs. Sanderson, 19 Vesey, 280.
Re Bridge, 1st Craig & P., 338.

Re Cummings, 1st De Gex, M. & G., 537.
Shelford on Lunatics, page 113.
Stock on *Non Compos Mentis*, star page 107.

Thus it appears that in England the right of a hearing upon the question involved, was secured to the alleged lunatic by statute as early as Edward the Sixth, and if that portion of the common law which pertained to the inquisition of lunacy had been applicable to our institutions, they would have come into the body of the laws of Alabama with this statute fixed upon them as an integral part.

Carter vs. Balfour, 19 Ala. 829.

The Statute Seventeen, Edward II., whereby the king becomes the guardian of the lunatics, and upon which the entire proceedings for the commission of lunacy stood for a foundation, was not, however, adapted to American Institutions, and neither it, nor the proceedings for its enforcement, ever became a part of the common law of the State of Alabama.

Whetstone vs. Whetstone, 75 Ala., 498.

AMERICAN DECISIONS.

From what we have said, it clearly appears that by common law no party could be declared a lunatic and deprived of the control of his property without an opportunity of trying the question, but that the proceedings for an inquisition of lunacy in the United States, rests entirely upon American statutes, and have no connection with the proceedings as it existed at common law. We turn, therefore, to an examination of the American decisions upon this subject, and from them we learn that an inquisition of lunacy is a judicial proceeding , whereby the alleged lunatic is deprived both of his liberty and property; that the very question at issue in such a proceeding, is his sanity,

vel non, and that both the proceedings and the right against which it is directed, are such as fall directly within the constitutional guaranty of the Fourteenth Amendment. In no place has this been more distinctly decided than in Alabama.

Eslava vs. Lepretre, 21 Ala., 504-522.
Molton vs. Henderson, 62 Ala., 430.
McCurry vs. Hooper, 12 Ala., 823.

In the case of Evans vs. Johnson, W. Va., 19 S. E., page 623, it is said: "It lies at the foundation of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property, and even his freedom of person, and commits his property, his person, his liberty to another, stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made, short of conviction of infamous crime. Will it be said in answer to this that he is insane, and that notice to an insane man will do him no good? The response is that his insanity is the very question to be tried, and he the only party interested in the issue. Often, if given notice, he will be prompt to attend, and in his person be the unanswerable witness of his sanity; often if not given notice, those interested in using or robbing him of his property, will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice."

In the case of Willman, 45 Pac. R. (Kansas), 726, the alleged lunatic was restrained of her liberty pending the proceedings, and in speaking of the right of due process of law, the court said: "This right is denied unless an opportunity is afforded to be present to exercise it. The express granting of the right to appear necessarily implies that notice should be given of the time and place of hearing, and of

the nature of the proceedings to be had. Even though the statutes made no special provision with reference thereto, we think the same right would exist, with the necessity for notice to the party to be affected by the proceedings.

Independently of statutes, every person is entitled to his day in court, and to the right to be heard before he is condemned. No mere *ex parte* proceedings can affect either personal or property rights. Were the legislature to attempt to enact a law authorizing judicial proceedings, the object of which was to affect the person or property of a citizen without notice or opportunity to be heard, such legislation would be rejected and repudiated, in advance, as an intolerable outrage upon the rights of the citizen. It would not only be a serious infringement of natural rights, but would be a flagrant violation of the constitutional guaranty that no person shall be deprived of his liberty or property without due process of law. Notice and *opportunity to be heard* lie at the foundation of all judicial procedure. They are fundamental principles of justice which cannot be ignored. Without them no citizen would be safe from the machinations of secret tribunals and the most sane member of the community might be adjudged insane and landed in the mad-house. It will not do to say it is useless to serve notice upon an insane person; that it would avail nothing because of his inability to take advantage of it. His sanity is the very thing to be tried. At the threshold of the inquiry, the court is supposed to have no knowledge of the mental condition, but the presumption of the law is in favor of sanity. Insanity, like crime, does not exist in law until it is established by evidence in a proper proceeding."

In the case of Chase vs. Hathaway, 14 Mass., 222, the court said: "We are of the opinion that, notwithstanding the silence of the statute, no decree of a probate court, so materially affecting the rights of property and the person, can be valid, unless the party to be affected has had an op-

portunity to be heard in defense of his rights."

In the case of McCurry vs. Hooper, 12 Ala. 823, Judge Dargan, speaking of this question, said: "I think it is a fundamental principle of justice, essential to the rights of every man, that he shall have notice of any judicial proceedings that are about to be had for the purpose of divesting him of his property, or the control of it, *that he may appear and show to them who sit in judgment on his rights*, that he has not lost them by the commission of a crime, nor should those rights be taken from him by reason of any misfortune; *that he has the right to appear before the jury and the court, and to show that he is not insane*, that he and his property should not be put in charge of another, is a self-evident truth and is denied by no legal authority."

Speaking of this matter in the case of

Allis v. Morton, 4 Gray (Mass.) 64,

the court said: "To say one is insane, and, therefore, need not be notified, is to decide the question before it is tried, nor would the existence of insanity be a good reason for dispensing with the notice. A man may be insane, so as to be a fit subject for guardianship; yet have a sensible opinion and strong feeling upon the question, who that guardian shall be." To the same effect are the following cases:

Re Dickie, 7 Abb., N. C., (N. Y. Sup.) 417.
Martin vs. Motsinger, 30 N. E. 524.
Evans vs. Johnson, 19 S. E. 624.
Hathaway vs. Clarke, 5 Pick., 490.
Hutchins vs. Johnston, 12 Conn. 376.
Broad vs. Budlong, 51 Barbour 493.
Stafford vs. Stafford, 1 Martin (N. S.) 551.
Eddy vs. People, 15 Ill. 386.
Sumway vs. Sumway, 2 Ver., 339.
Ex parte Dozier, 4 Baxter 81.

Commonwealth vs. Kirkbridge, 2 Brewst. 419.
Morton vs. Sims, 44 Ga. 298.
Jessup vs. Jessup, 34 N. E. 1017.
Whitenack case, 2 Green, Chy., N. Y. 253-4.
Bush on Insanity, p. 55.
Stock on *Non Compos Mentis*, Sec. 100.

In one case, at least, it has been held that the actual presence of the lunatic is essential.

In re Whetmore vs. Whetmore, 33 Pac. 617.

In answer to all we have said upon this point, the Supreme Court of Alabama have been content to reply, "We do not doubt she was brought into court in the manner prescribed by statute," (Record p. 48), or in other words, that the enactment of the statute, converted the service of the statutory notice into due process of law, even though it provided for no hearing.

Of the same nature is the contention heretofore, and presumably still, put forward by the defendant in error, that since the Probate Court of Mobile, in appointing Mr. Richard, declared that "due process had been served upon the lunatic," this declaration was binding upon her in every tribunal in which these proceedings might be made the basis of an alleged right against her. To hold that either the Legislature or a Court of a State can, by its declaration, make anything which it may choose to so declare, effective as the service of due process of law, would entirely nullify the fourteenth amendment of the Constitution of the United States, or at least the power of the Federal Courts to enforce its provisions. It is not our purpose to deny that in many of the States it has been held that where jurisdictional facts are ascertained by the Court rendering a judgment, such judgment cannot be collaterally impeached in the Courts of the same jurisdiction. It is not necessary that we should consider

the correctness of this doctrine, as to which there is a grave conflict in the authorities throughout the country.

Black on Judgments, section 275.

Whatever view may be taken of this doctrine as applied to jurisdictional facts other than the service of notice, so as to afford the defendant the opportunity of testing the jurisdiction of the court upon a direct appeal, this doctrine when applied to false recitations contained in a judgment to the effect that the party sought to be bound has been duly served with notice, or afforded an opportunity of being heard, appears to our mind to be contrary to the first principles of natural justice. Such recitations are material only so far as they constitute adjudications, and no action by a court is entitled to be called an adjudication until the parties are brought before it.

Upon this subject, the decisions of the Supreme Court of Alabama are not in harmony. Before undertaking to discuss them, however, we must submit that the doctrine, even if thoroughly established in Alabama, could not avail the defendant in error.

1st. Because the recitation contained in the decree of the Probate Court in the matter of the appointment of the guardian, was not an adjudication that notice had been served upon the defendant, and that Mrs. Simon was afforded an opportunity of being heard, but is an attempted adjudication in her absence, that the notice given to her, although accompanied by the arrest of her person and her detention in the custody of the sheriff, so as to deprive her of all opportunity of being heard, constituted the service of due process of law. By the agreement of counsel upon which this case was tried, record, page 12, paragraph fourth, it was expressly admitted that the service shown by the return of the sheriff, record pages 20-21, the effect of which we have already

discussed, was the only process which was served in this cause. But even in those States which hold that a recitation of the service of process, cannot be collaterally impeached, the doctrine has always been limited to cases where the recitation was not expressly contradicted by other portions of the record.

Beasley *et al.* vs. Howell, Adm., 117 Ala. 505.
Harris vs. Clellanhan, 11 Lea 181.
Black on Judgments, section 723.

Indeed the language of this court in the case of Settlemire vs. Sullivan, 97 U. S. 448, would seem to be conclusive. It is there said: "Here it is contended that the recital in the entry of the default of the defendant in the case in the State court, 'that, although duly served with process, he did not come, but made default,' is evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission. But the answer is, that the recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former.

We do not question the doctrine that a court of general jurisdiction acting within the scope of its authority —that is, within the boundaries which the law assigns to it with respect to subjects and persons—is presumed to act rightly and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly

brought to its knowledge. But if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred. 'If, for example,' to give an illustration from the case of Galpin vs. Page, (18 Wal. 366), 'It appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also."

2nd. Nor can it be doubted that the Federal Courts are of foreign jurisdiction to those of the State, or that any judgment of a State Court which is relied upon as the basis of a right may be collaterally attacked in the Federal Court, because of the want of jurisdiction either of the subject matter, or of the parties.

Cooper vs. Newall, 173 U. S. 567.
Thornman vs. Frame, 176 U. S. 356.

There seems really to be no distinction between the question as to whether the Legislature of a State may, by its declaration, constitute whatever formality it may choose, the service of due process of law, so as to bind those who have really no notice or opportunity to defend, and the question as to whether a court of a State may, by so declaring, accomplish the same purpose. That the Legislature of a State cannot bind the Supreme Court of the United States by its enactments as to what shall constitute the service of due process of law, has been thoroughly established.

The Dartsmouth College Case, 4 Wheat. 518, 581.

Chicago & Burlington R. R. Co. vs. Chicago, 116 U. S. 232.
Smyth vs. Ames, 169 U. S. 527.
Davidson vs. New Orleans, 96 U. S. 102.
Ziegler vs. S. & N. Ala. Rd. Co., 58 Ala. 594.
Cooley on Constitutional Limitations, p. 431.

And we understand the same rule to have been repeatedly announced in reference to the collateral attack upon the judgments. No better statement of the reason for our contention could be made than that of Mr. Justice Bradley, in the case of Thompson vs. Whitman, 18 Wallace 468, where it is said: "But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statement could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry."

Indeed to say that the plaintiff in error is now precluded from questioning the validity of the proceedings in the Probate Court for the want of the service of due process of law, because of the recitations contained in the judgment, which is itself contradicted by the return of the sheriff contained in the record, is to assume its validity and binding effect as a basis upon which to argue the truth of the premises assumed. There are two cases which so much resemble the case at bar in this particular as to call for their especial citation.

Windsor vs. McVey, 93 U. S. 274.
Scott vs. McNeal, 154 U. S. 34.

Upon the right of the defendant to collaterally attack

the enforcement of any judgment which may be rendered against him without the service of due process of law, depends the correctness of those cases in which it has been held in this court, that the mere entry of a judgment, without the service of due process of law, does not deprive the defendant of his life, liberty and property without due process of law, because such a judgment is a mere nullity which will not be given any force or effect in any other tribunal.

York vs. Texas, 137 U. S. 15.
Kaufman vs. Wooters, 138 U. S. 285.

In the case of the Guaranty Company vs. Green Cove Springs & Melrose R. R. Co., 139 U. S. 147, the court said: "It was said by Mr. Justice Wayne, in Williamson vs. Berry, 8 How. 495, 540, in reply to an argument that a decree in chancery court not be looked into in a collateral way, that 'it is an equally well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law.' The decisions of this court upon this subject, beginning in the year 1794 with the case of the Betsey, 3 Dall. 6, have been uniform and consistent."

Noble vs. The U. S. River Logging R. R., 147 U. S. 173.
Earle vs. McVey, 91 U. S. 503.

Elliott *et al.* vs. Piersoll, 1 Peters 340.
Williamson vs. Berry, 8 [redacted] (U. S.) 541.

Prior to the decision which is now appealed from, it has always been held in Alabama, that the appointment of a guardian by any Probate Court may be collaterally impeached in any other court of that State.

Molton vs. Henderson, 62 Ala. 426.
Eslava vs. Papretre, 21 Ala. 522.
Moody vs. Bibb, 50 Ala. 248.

There exists, so far as we have been able to learn, no case in Alabama in conflict with these decisions.

There is, however, a long line of opinions in the State, holding and holding correctly, that a sale by the probate court of property *belonging to the estate of a deceased person* cannot be attacked collaterally, if based upon a petition of a regularly appointed administrator, containing the necessary jurisdictional allegations.

These decisions have been cited and argued with great persistency by the defendant in error, as applicable to this case, which is a sale by an alleged guardian—the distinction between the two classes of cases and the decisions cited *supra*, being entirely ignored.

These cases, however, will be found upon examination to be clearly distinguishable from, and not at all in conflict with, those relied upon by plaintiff in error, and above cited. In all of the Alabama cases cited by defendant in error it will be seen that the probate court *had jurisdiction* to appoint an administrator—that is, there was in fact a decedent of whose estate an administrator could be appointed, and *that there was a vacancy in such administratorship,* no administrator having been

appointed, or the administrator having been removed if he had been appointed. It is true that, as a general rule, where the probate court exercises the power to appoint an administrator of an estate, it is to be presumed that it previously ascertained the existence of the jurisdictional fact, without which the power could not be legally exercised; but in the language of the Supreme Court of Alabama, in the case of Bean vs Chapman, cited below, *"one of the established exceptions to this rule is where there is no vacancy in an administration, evidence is admissible, even in a collateral proceeding, to show the fact, and in such event the second grant is absolutely void."*

Bean vs. Chapman, 73 Ala. 144.
Colthart vs. Allen, 40 Ala. 155.
Allen vs. Kellam, 69 Ala. 446.
Hooper vs. Scarborough, 57 Ala. 510.
Gray vs. Cruise, 36 Ala. 559.

When a supposed decedent is really alive, does there exist such a "vacancy" as can give the probate court jurisdiction to fill it by the appointment of an administrator? Clearly not.

Duncan vs. Stewart, 25 Ala. 408.
Bean vs. Chapman, 73 Ala. 144.
Scott vs. McNeal, 154 U. S. 34.
Bradley vs. Broughton, 34 Ala. 707.

We see, therefore, that it is well established in Alabama that there can be no valid sale, even at the petition of an alleged administrator, unless the jurisdictional fact of death of the owner actually exists, and that this inquiry is not precluded by the order of sale even upon collateral attack. The contrary has been casually assumed in one or two cases where the question was not involved but always

without reference to the well considered line of authorities cited above, establishing the doctrine for which we contend.

However, we have only to glance at the statutes in regard to the two classes of sales, in order to learn that there is no conflict even between the cases holding that a sale by an alleged guardian may be collaterally attacked on account of defects in proceedings under which the guardian was appointed, and those cases asserting that a sale made by the probate court, upon the petition of an alleged administrator, cannot be collaterally attacked, although the petitioner was not in fact such administrator. The distinctions are manifest.

The statute that provides for sales by the probate court, upon the petition of administrators, reads as follows:

2104. "SALES IN CASE OF INTESTACY.—In cases of intestacy, land may be sold by the administrator for the payment of debts, when the personal estate is insufficient therefor."

Of these proceedings, parties are given due notice, and have their day in court to controvert the existence of the administratorship.

2107. "DAY FIXED FOR TRIAL, APPOINTMENT OF GUARDIAN *AD LITEM*.—The court must appoint a day not less than forty days from the time of making such application for the hearing thereof, and must appoint a proper person, not a petitioner, or of kin to petitioner, as guardian *ad litem* to represent the minors, or persons of unsound mind, if any there be, and must issue a citation to the heirs or devisees of full age, and residing in this State, notifying them of the application, and of the day appointed for hearing the same, which must be served on them ten days before the date appointed for the hearing; and if any such heirs or de-

visees is a married woman, the citation must be served on the husband as well as the wife.

In addition to this, there is a provision for publication as to non-residents.

And the sale is by the court, and not by the administrator.

The administrator usually acts, but the court can appoint any other person as its agent to make the sale and conveyance.

Code, sec. 2124.
Pollard vs. Hanvick, 74 Ala. 337.

On the contrary, the court does not sell the property of an alleged lunatic. It has no power to do so. The statute only empowers it to authorize a designated person to make such a sale, namely, the guardian. If there is no guardian, there is no authority in the court to authorize the sale.

Code, 2434.
Grier's Appeal, 101 Pa. St. 412.
Molton vs. Henderson, 62 Ala. 430.
Eslava vs. Lapretre, 21 Ala. 522.
Moody vs. Bibb, 50 Ala. 248.

No notice of the petition by the guardian to sell is given to the alleged ward. Why? If the petitioner be the legal guardian, he is the authorized agent of the owner, and thus the owner is the movant. If he is not the legally constituted guardian, he cannot represent the owner in this or any other matter, and thus since the proceedings are by a stranger, and without notice, there is no due process of law and no day in court for the owner.

The difference between the two classes of sales is therefore plain. Upon a petition by an administrator the parties in interest are brought before the court and are therefore bound by the decree. Upon a petition by an alleged

guardian, the ward is given no notice, but is present through the guardian, if duly appointed, and if the alleged guardian has not been duly appointed then the ward has no due process whatsoever and the proceeding is *res inter alias acta* and void. In one the court makes the sale; in the other the legally constituted guardian and none other acts. The court only authorizes him to act, and can authorize none other.

The statute reads as follows:

SALE TO PAY DEBTS, &c., OF PERSONS OF UNSOUND MIND.—The court of probate may authorize the guardian of a person of unsound mind to sell any property of such person, real or personal, when necessary for the payment of debts or liabilities of such person incurred before the inquisition against him, or before the appointment of a guardian, or incurred after such inquisition and the appointment of a guardian, for the maintenance of such person, or for the maintenance of his family.

There is another broad distinction between the appointment of an administrator and the appointment of a guardian; in making the former the probate court acts as a court of general jurisdiction, under powers conferred upon it by the constitution. Its judgment making such an appointment is therefore final except upon a direct appeal.

In the appointment of a guardian, however, the probate court exercises statutory powers which rest upon the existence of certain facts, which must affirmatively appear upon the record to uphold the appointment.

Moody vs. Bibb, 50 Ala. 248.
Pettus vs. McClannaghan, 52 Ala. 58.

It is not therefore difficult to reconcile the decisions holding that a sale by the court, at the petition of an administrator cannot be collaterally attacked, with those holding that a sale by an individual calling himself guardian when he has really never been legally appointed as such, can be collaterally attacked.

Molton vs. Henderson, 62 Ala. 426.
Eslava vs. Lapretre, 21 Ala. 522.
Moody vs. Bibb, 50 Ala. 248.

It is manifest that to authorize a sale of the property of a living person upon a petition by an alleged guardian of which the owner has no notice, two things must exist; first, there must be a guardian; second, he must obtain authority from the probate court to make the sale.

To hold that the invalidity of the appointment of the guardian could not be set up in the collateral proceedings involving the title to property sold by him would be to hold that the absence of due process of law constitutes a mere irregularity, and does not affect the jurisdiction of the court over the person, and that it could be reached only by a direct appeal within a given time which, in most cases, would expire before the person, whose rights were affected, had learned of the existence of the proceedings.

IV.

THE TRIBUNAL THAT ATTEMPTED TO ADJUDICATE THE LUNACY OF THE PLAINTIFF IN ERROR NEVER HAD JURISDICTION TO APPOINT A GUARDIAN OF HER ESTATE.

Upon questions not involving a federal question, the Supreme Court of the United States will follow the construction -placed upon a state statute by the state court of last resort, but where the question is whether the statute provides due process of law the Supreme Court of the United States will place its own construction upon the statute.

In the case of Rose vs. Himely, 4 Cranch, p. 241, Chief Justice Marshall, in delivering the opinion after reviewing the authorities upon the subject, declared that the Supreme Court would necessarily pass for itself, not only upon the constitution of the court whose jurisdiction was cited to be upheld as due process of law, but the citation of the party in the allegation of the petition, to show whether or not the particular case was brought within the jurisdiction which the court possessed.

In the case of Thompson vs. Whiteman, in 18 Wal. 460, Justice Bradley, reviewing all the authorities upon the subject, quoted, from other authorities, on page 467. He says: "The jurisdiction of any court, exercising authority over a subject, may be inquired into, in every other court when the proceedings in the former court are

relied upon, and brought before the latter by a party claiming the benefit of such proceedings; and the rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled had arisen under the laws of nations, the practice in chancery, or the municipal laws of States."

So, too, in the case of Scott vs. McNeal, 154 U. S. 34, Mr. Justice Grey said, on page 46: "No judgment of a court is due process of law if rendered without jurisdiction in the court." The Justice then proceeded to declare that the Supreme Court of the United States would, upon a writ of error from the State court, review its decision upon the question of the jurisdiction of the probate court to appoint an administrator of a decedent's estate.

We maintain, therefore, that the Supreme Court of the United States must review the decision of the Supreme Court of Alabama upon the question as to whether the probate court of Mobile county had jurisdiction of the subject matter so as to authorize it to appoint a guardian for Mrs. Simon, even if she had been accorded a full opportunity to have appeared and defended the matter.

WHEN AND HOW CAN THE ABSENCE OF JURISDICTION BE SHOWN?

If the court that rendered a judgment acts as a court of general jurisdiction, everything is presumed to be within its jurisdiction not affirmatively shown by the record to be without its jurisdiction, while if the court is one of special or limited jurisdiction, nothing will be presumed to be within its jurisdiction which is not so affirmatively shown by the record.

Pettus vs. McClannahan, 52 Ala. 57.

Bottoms & Powell vs. Brewer & Brewer, 54 Ala. 289.

It is true that when a court, even of limited jurisdiction, specifically adjudicates the jurisdictional facts to exist, its judgment cannot be attacked collaterally by evidence *de hors* the record, but where the record of a court, even of general jurisdiction, affirmatively shows the want of jurisdiction, its judgment will be treated as a nullity even in a collateral proceedings.

Hooper vs. Scarborough, 57 Ala., 510.

And in determining, from the record, whether the court had jurisdiction, the inspection is not confined to the decree of the court, but may extend to every part of the record.

Goodwin vs. Sims, 86 Ala., 108.

In the appointment of a guardian for a lunatic, the probate court is one of special or limited jurisdiction, and nothing will be presumed to have been within its jurisdiction that is not so affirmatively shown by the records.

Pettus vs. McClannahan, 52 Ala., 57.
Bottoms & Powell vs. Brewer & Brewer, 54 Ala., 289.

III.

The record does not affirmatively show that the probate court had jurisdiction to appoint Ralph G. Richard guardian of the plaintiff in error; on the contrary, it affirmatively shows that it did not have such jurisdiction.

1st. Because no jury constituted as required by law in such cases was ever drawn, summoned and empanneled.

2nd. Because no sufficient verdict was rendered.

The PROBATE COURT has no jurisdiction as a court to determine or adjudge a person to be a lunatic; that jurisdiction is vested by the statute in a specific tribunal con-

sisting of the judge of probate, and a jury to be drawn and summoned in a specific manner.

Until the matter was regulated by statute, the probate court had no jurisdiction to adjudicate the question of sanity *vel non;* that jurisdiction was vested in the Chancery Court.

11 A. & E. Ency. of Law, p. 114.

If the probate court now has such jurisdiction the statuate law of this state must be looked to for its source and extent.

By the act of March 12th, 1803, Toulmin's Digest, pp. 384-5, Sec. 51, the Orphans' Court was authorized to issue a writ to the sheriff of the county "to summon twelve good, discreet and lawful men of the county *and neighborhood* of the residence of such person" (i. e. of the supposed lunatic) "to make inquisition thereto on oath; and if the person said to be an idiot, lunatic, or *non compos mentis,* shall be adjudged *by such* inquisition" (or the major part of them) "to be incapable of taking care of himself or herself, and they shall certify the same under their hands and seals to the Orphans' Court, the court shall assign some suitable person or persons to be guardian or guardians."

The law read "That the Orphans' Court are hereby authorized, and empowered, within their respective counties on request made by the friends or relations of any idiot, lunatic, or person *non compos mentis* or by the overseer of the poor for the district in which such idiot, lunatic, or person *non compos mentis* resides or is an inhabitant, by writ, to direct the sheriff of the said county to summon twelve good, discreet, and lawful men of the county and neighborhood of the residence of such person to make inquisition thereto, on oath; and if the person said to be an idiot, lunatic, or *non compos mentis,* shall be adjudged by such inquisition, (or the major part of them,) to be incapable of taking care of him or herself, and they shall certify the

same under their hands and seals, to the Orphans' Court, the said court shall assign some suitable person or persons to be the guardian or guardians."

This statute conferred jurisdiction upon the Orphans' Court to order the sheriff to hold the inquisition, but did not confer jurisdiction upon the court itself to hold it; it did not even authorize the judge of probate to order the inquisition to be held in the presence of the judge of probate.

Eslava vs. Lapretre, 21 Ala., 523.

Under the act of 1803 four things are clear:

1st. That it conferred no jurisdiction upon the probate court to adjudicate the question of lunacy.

2d. That it constituted a special statutory tribunal consisting of the sheriff and twelve jurors, to adjudicate such fact.

3d. That it required that the jurors should be both of the county *and neighborhood* of the residence of the alleged lunatic.

4th. That it gave the Orphans' Court jurisdiction to appoint a guardian upon the certificate by the special tribunal of its finding of lunacy alone.

It is apparent that unless conferred by some amendment to this act, the probate court has no jurisdiction to adjudicate lunacy, nor has it jurisdiction to issue a writ to the sheriff to summon a jury other than of the county *and neighborhood* of the residence of the alleged lunatic to hold such inquest.

In 1819, Clay's Ala. Digest, p. 302, the legislature authorized the Orphans' Court to appoint guardians for lunatics within their jurisdiction, regulating the security to be given by the guardians, and their responsibility, but left the method of adjudicating the question of lunacy *vel non*, unaltered. The law read as follows:

"It shall be lawful for every orphans' court within this

State, where any idiots or lunatics shall be within the jurisdiction thereof, to appoint them, or either of them, a guardian, taking bond with approved security, for the faithful administration of the trust reposed in the same manner as bonds are taken from the guardians of orphans; and such guardian, when so appointed, shall continue during the pleasure of the court, and shall have the same power, to all intents, constructions, and purposes, and shall be subject to the same rules, orders, and restrictions, as guardians of orphans are; such lunacy to be ascertained by the inquisition of a jury, by virtue of a writ to be issued by the court, to the sheriff of the county for that purpose."

In 1821, Toulmin's Digest, p. 385, the legislature modified the provisions of the act of 1803 in two particulars, only.

1st. It provided that the inquisition might be ordered either in vacation or in open court.

2d. It provided that *on sufficient cause shown* the *judge* may order the inquisition to be had before him; this act expressly provided that "in other respects the same proceedings shall be had thereon as heretofore," reads as follows:

"That inquisitions as to idiots, lunatics, or persons *non compos mentis*, may be ordered in vacation, or in open court, and made returnable as process of citation on sufficient cause shown, the judge may order any such inquisition to be had before him; in other respects, the same proceedings shall be had thereon as heretofore."

It is clear that down to this point the only jurisdiction conferred upon the court was, *first*, to order a writ to issue to the sheriff to summon the jury and hold the inquisition; *second*, to order such inquisition held before the judge of probate, upon sufficient cause being shown therefor, and *third*, to appoint a guardian *if and when*, the inquisition should adjudge the alleged lunatic to be incapable of taking care of himself, and certify the same under their hands

and seals to the orphans' court.

That this statute did not confer jurisdiction upon the orphans' court to adjudicate the question of lunacy, is as clear as language can make it. It is also clear that down to this point the only writ that the court was authorized to issue, was a writ addressed to the sheriff, commanding him to summon a jury of twelve men of the county *and neighborhood* of the residence of the alleged lunatic, and that the only power the sheriff had was to summon *such* a jury, and that the inquest could only be held by a jury *so* summoned.

By the acts of February 5th and 9th, 1850, (Acts of 1849, pp. 43 and 47) certain commissioners were appointed to prepare a code of laws without being strictly confined to the codification of the laws as they then existed. This codification resulted in the code of 1852, and the law was there modified in the following particulars only:

1st. By authorizing the court to appoint a day and issue a writ only upon the petition of a relation or friend of the alleged lunatic.

2d. By requiring the petition to set forth the facts, name, sex, age and residence of the alleged lunatic.

3d. By requiring the petition to be verified by an affidavit that the petitioner believes the facts therein stated to be true.

4th. Upon the filing of such a petition, it authorizes the judge of *probate* to appoint a day for the hearing thereof.

5th. It authorizes the judge of probate, instead of the county court, to issue the writ to summon a jury *of the neighborhood.*

6th. It further authorizes the judge of probate to issue a writ to the sheriff to take the alleged insane person, or idiot, and, if consistent with his health or safety, have him present at the place of trial.

7th. It requires that the verdict shall ascertain that *the facts alleged* in the petition are true, *and* that such person is an idiot, lunatic or *non compos mentis*, and provides that, upon the rendition of such a verdict, the court must cause the petition, and all proceedings thereon to be recorded, whereas, under the original act, the judgment of the inquisition need only have ascertained that the alleged lunatic was incapable of taking care of himself or herself.

The provisions of the Code of 1852 read as follows:

"2750. Upon the petition of any of the relations or friends of any person alleged to be an idiot, lunatic, or person *non compos mentis*, setting forth the facts and name, sex, age, and residence, of such alleged idiot or lunatic, accompanied by an affidavit that the petitioner believes the facts therein stated to be true, the judge of probate of the county in which such alleged lunatic, idiot, or person *non compos mentis* resides, must appoint a day not more than ten days from the presentment of such petition, for the hearing thereof."

"2751. He must also issue a writ, directed to the sheriff, commanding him to summon twelve disinterested persons of the neighborhood for the trial thereof, and also issue subpœnas for witnesses as the parties may require, returnable to the time of trial; he must also issue a writ directed to the sheriff, to take the alleged insane person or idiot, and if consistent with his health or safety, have him present at the place of trial."

"2753. If the jury find by their verdict that the facts alleged in the petition are true, and that such person is an idiot, lunatic, or *non compos mentis*, the court must cause the petition, and all the proceedings thereon, to be recorded, and appoint a suitable person guardian to such idiot, lunatic, or *non compos mentis*, requiring him to execute bond as other guardians."

It will be noted that no change is made, intimating in the remotest degree an intention to transfer the jurisdiction to declare a person a lunatic, from the special tribunal consisting, first, of the sheriff and a jury, and later, either of the sheriff and jury, or of the judge of probate and jury, to the probate court; on the contrary, every change made, limits, instead of enlarging, the powers of the court, limits the right to an inquest by requiring that it shall only be upon a petition *of a relative, or friend, stating the facts, and the name, age, and residence of the alleged lunatic,* and that the petition shall be sworn to, and it requires that the verdict ascertain the facts, and that the person is an idiot, lunatic, or *non mentis compos* before it authorizes the court to appoint a guardian for her.

The law, as declared in Eslava vs. Lepretre, 21 Ala., 522, remained substantially unchanged by the code of 1852, except that the hearing by the jury is always had before the judge of probate court.

Laughinghouse vs. Laughinghouse, 38 Ala., 257.

There has been no act of the legislature making any amendment of these provisions or of the code of 1852, and they are carried forward through the successive codes, in substantially the same language, until the present day.

It is apparent, therefore,

1st. That the probate court has never had jurisdiction to declare a person a lunatic.

2d. That the jury the court is required to summon, is not a jury to try an issue *in the probate court,* but one summoned to constitute a special statutory tribunal to try and determine, under the direction of the judge of probate, the question of lunacy.

3d. That the probate court has no jurisdiction to appoint a guardian for an alleged lunatic, until such statutory tribunal has been formed, and has rendered its statutory verdict.

These conclusions were clear under the provisions of the code of 1852, but have been emphasized in the code of 1886. Sec. 2016 of the code of 1852, sec. 2414 of the code of 1867, and sec. 2753 of the code of 1876, all provide: "The judge of probate must also appoint guardians for persons of unsound mind who may reside in his county and be possessed of any estate real or personal," but the secs. 2390 and 2391, of the code of 1886, in force when the proceedings in question were had, (hereinbefore set out on page 10), as if anticipating that the contention made in this case by defendant in error might arise, and the argument be made that the jurisdiction to appoint a guardian of a lunatic was not dependent upon a strict observance of the statutory proceedings prescribed for the determination of the question of lunacy, emphatically declared that it should be so dependent. Section 2390 provides that the probate court shall appoint guardians *under the limitations and in the mode hereinafter* prescribed, and sec. 2391 provides that a "guardian for a person alleged to be of unsound mind, residing in the county, *must not be appointed until an inquisition has been had and taken, as hereinafter directed.*"

Even if the probate court had expressly adjudicated all of the facts necessary to give it jurisdiction to appoint Ralph G. Richard as guardian of plaintiff in error, such adjudication would not be binding, for the reason that the court has, as we have shown, no power to make the adjudication.

Goodwin vs. Sims, 86 Ala., 108.

The court did not, however, undertake to so adjudicate; it merely appointed a guardian, and the appointment must be held void, unless the record affirmatively shows that the court had jurisdiction to make it.

Moody vs. Bibb, 50 Ala., 248.
Pettus vs. McClannahan, 52 Ala., 58.

The record really shows affirmatively that the court did not have jurisdiction to make the appointment.

THE ALLEGATIONS OF THE PETITION FOR AN INQUISITION OF LUNACY WERE INSUFFICIENT TO CONFER JURISDICTION TO APPOINT A GUARDIAN.

The statute authorizing such an inquisition reads as follows: "2390. APPOINTMENT.—The court of probate has authority, and it is a duty to appoint guardians for persons of unsound mind residing in the county, having an estate, real or personal, and of persons of unsound mind residing without the state, having within the county property requiring the care of a guardian under the limitations and in the mode hereinafter prescribed."

The petition for the inquisition alleged that the plaintiff in error resided in Mobile county, but did not allege that she had any property, real or personal, and was therefore insufficient to confer jurisdiction to appoint a guardian.

We respectfully refer to the dissenting opinion of Mr. Justice Head in this case, which will be found on page 49 of the record, and adopt the language of that opinion as our argument upon this proposition.

NO WRIT WAS ISSUED TO THE SHERIFF COMMANDING HIM TO SUMMON TWELVE DISINTERESTED PERSONS OF THE NEIGHBORHOOD FOR THE TRIAL OF THE INQUISITION.

In this case, the record affirmatively shows that the judge of probate arbitrarily selected twenty-four persons, some of whom resided in the city of Mobile, and some outside of the city, but in the county, and four of whom were non-residents. The record does not show that they were either *disinterested,* or *of the neighborhood* of the residence

of the plaintiff in error. It is submitted that these facts alone show that no jury, authorized to try the writ, was ever summoned.

It is claimed by the defendant in error that the special jury law for Mobile county, modifies section 2393, and that the jury was properly drawn, under the law; but this is a mistake. The section of the special jury law, supposed to have that effect, is sec. 12 (Acts of 1882-3, p. 509) which provides that "Whenever a jury is required to try an issue *in the probate court* the judge of said court shall, in the presence of three other jury commissioners, draw from the "circuit court jury box" twenty-four names, which shall be recorded as they are drawn," but we have seen that this was not "an issue in the probate court;" it was a trial by a statutory tribunal, to be presided over by the judge of the probate court, but was not an issue tried in that court, and the special jury law for Mobile county, therefore, is not applicable; but if the special jury law for Mobile was applicable, still, the record does not show that the jury was drawn according thereto; it does not show that the jurors were drawn from the jury box of the circuit court, nor that they were drawn by the judge of probate in the presence of those commissioners.

It is further claimed by the defendant in error that even if the writ issued by the sheriff be controlled by section 2393 of the code, and be not affected by the special jury law for Mobile county, the writ need not require the jury to be summoned from the neighborhood of the alleged lunatic; that the terms "neighborhood" is synonymous with the term "county," and that a jury summoned from the county, complies with the requirement. Such is certainly not the ordinary acceptation of the term neighborhood. All jurors are supposed to be drawn from the county in which the trial is had, and to give the word "neighborhood" such an interpretation is to entirely deprive it of any mean-

ing whatever, as the jury would necessarily be empannelled from the county without any special provision. It may be that a jury summoned from the neighborhood of the alleged lunatic's residence, necessarily includes only persons, residing within the same county, for the sheriff has no authority to summon a person residing in another county; it does not, however, follow that every person residing in the same county is a resident of the same neighborhood, and the history of the act shows that the word "neighborhood" was not intended as a mere synonym for the term "county," for, by the Act of 1803, where the term was first introduced into the statute it was expressly declared that the sheriff should summon "twelve good, discreet and lawful men *of the county and neighborhood* of the residence of such person." As the sheriff could summon only men of the county, that portion of the statute was deemed superfluous, and was omitted by subsequent codifiers, but the meaning of the term neighborhood, as originally introduced into the statute, has not been altered by any subsequent legislation, or codification, and the qualification of jurors is retained in the statute as one of the many provisions found there for the protection of the unfortunate class supposed to be *non compos*.

The provisions of the statute that the jury shall be composed of persons both *disinterested*, and *of the neighborhood*, is plain; it was intended to protect the alleged lunatic against the designing, by having a jury that are both disinterested, and who, by their residence, are likely to know something of the alleged lunatic, and his or her surroundings, and as to whether the effort to have him, or her, adjudged insane, is really in his, or her, interest, or part of a scheme on the part of some designing person to get charge of the estate of such person; the provision that the alleged lunatic shall be tried by her neighbors, is but a complement to the provision that requires the petition to be filed by a friend or relative.

THE WRIT DID NOT DIRECT THE SHERIFF TO SUMMON A JURY FOR THE TRIAL OF THE ALLEGATIONS OF THE PETITION.

The writ simply required the sheriff to summon a jury "to make inquest and try whether Jetty Simon is of unsound mind and incapable from such cause of governing herself and managing her affairs." The mere fact that the writ addressed to the sheriff did not properly recite the purpose for which the jury was summoned, would probably not have rendered the proceedings void, but the recitations of the summons that the jury was summoned to try whether the plaintiff in error was of unsound mind, &c., in connection with the fact that their verdict was confined to the ascertainment of this fact, raises the presumption, in the absence of any recitation in the record to the contrary, that the allegations of the petition, although jurisdictional, were not submitted to the jury for adjudication.

IT DOES NOT AFFIRMATIVELY APPEAR FROM THE RECORD THAT IT WAS EVER ADJUDICATED THAT THE PETITION FOR A WRIT OF LUNACY WAS FILED BY A FRIEND OR RELATIVE, NOR DOES IT AFFIRMATIVELY APPEAR THAT THE PLAINTIFF IN ERROR WAS OVER THE AGE OF TWENTY-ONE YEARS, OR A RESIDENT OF MOBILE COUNTY.

Each of these matters was jurisdictional, and every jurisdictional fact must affirmatively appear upon the record, in order to uphold the validity of the proceedings.

Pettus v. McClannahan, 52 Ala. 58.

We have seen that there is no jurisdiction to institute an inquest of lunacy, except upon a petition by a friend or relative, stating the facts, the name, age and residence of the alleged lunatic, and the question is, how is it to be ad-

judicated whether the petition is led by a friend or relative, or whether the alleged lunatic is of age, and a resident of the county? The statute clearly provides for the ascertainment of all these facts; Sec. 2392, set out in Part II of this brief, requires that all these facts be alleged in the petition; Section 2393 provides that a jury shall be summoned for the trial thereof; Section 2394 requires that the jury shall be sworn "well and truly to make inquisition of *the facts alleged* in the petition *and a* true verdict render according to the evidence;" while Section 2395 provides that "if the jury find by their verdict that the *facts alleged in this petition* are true *and that such person is of unsound mind* the court must cause the petition and all of the proceedings thereon to be recorded, and appoint a suitable guardian for such person." It thus clearly appears that the ascertainment of *all these jurisdictional facts* is confided to the jury, and *must be* affirmatively found by them before the appointment of a guardian can be upheld as valid; but it is suggested by defendant in error that the finding of these facts is confided to the court, because the court can only issue its writ where the facts exist, and yet the law necessarily requires the writ to issue before the jury is summoned.

The argument is not sound; the filing of a petition gives the court jurisdiction to issue the writ to institute the necessary inquiry as to the truth or falsity of the allegations, but not to adjudicate them; to say that by the issuance of the writ, the court adjudicated the truth of the allegations of the petition, would be to first adjudicate material elements of the controversy, and then constitute a tribunal to try what had already been determined; it would be to give a party notice to appear after the case was decided. As well might it be said that the issuance of a writ of attachment, or detinue, is an adjudication of the truth of the allegations of the affidavit.

FOR THE ASCERTAINMENT OF THE SEVERAL JURISDICTIONAL ALLEGATIONS OF THE PETITION, WE MUST LOOK TO THE VERDICT OF THE JURY.

It is to the jury alone, that the determination of these matters is confided, and it is only upon its ascertainment of them that the probate court is authorized to grant letters of guardianship.

Originally the writ to the sheriff to summon an inquest of lunacy issued, without a petition, upon the mere request of a friend or relation of the alleged lunatic, and the verdict was only required to ascertain that the alleged lunatic was incapable of taking care of himself or herself, and upon such verdict a guardian was appointed.

Acts of 1803, Toulmin's Digest, pp. 384-5, sec. 51.

But, when by the Code of 1852, it was required that the petition be made by a friend or relative, and that it should set forth the facts, name, age and residence of the alleged lunatic, it was further required that the verdict should ascertain that the *facts alleged in the petition* are true *and* that such a person is a lunatic. It will thus be seen that a verdict ascertaining *only* that the alleged lunatic is *non compos* was formerly sufficient, and that the statute was expressly changed so as to make it insufficient.

Code of 1852, sections 2750-53.

The verdict in this case only found that the plaintiff in error was *non compos*, and did not find the other facts alleged in the petition to be true, and as the court was only authorized to appoint a guardian upon a verdict ascertaining such facts to be true, its appointment of Ralph G. Richard was necessarily without jurisdiction, and absolutely void.

Eslava vs. Lepretre, 21 Ala. 522.
Moody vs. Bibb, 50 Ala. 248.
Molton vs. Henderson, 62 Ala. 430.

That a verdict ascertaining the facts alleged in the petition to be true is jurisdictional, and that the appointment of a guardian without such a verdict is absolutely void, has been adjudicated in several States.

Guthrie vs. Guthrie, 51 N. W. Rep. 13.
State vs. Billings, 57 N. W. Rep. 206.
Menefee vs. Ends, 30 S. W. Rep. 882.

As we have already suggested, in our opinion the probate court had no right nor power to render any decree whatever in this matter. It is the verdict of the jury, and not the judgment of the court, which authorizes the appointment of the guardian, under our statute; but be this as it may, the court itself, in this case, has not undertaken to try and determine the other issues in the case, but has undertaken to adjudicate simply *"that the petition and all of the proceedings thereon, together with the verdict of the jury, declaring the said Jetty Simon a lunatic, be recorded,"* and the other jurisdictional facts stand today, without having been ascertained or declared either by the court or by the jury. The reasons which have prompted our legislature to provide that a guardian shall be appointed only upon the finding of the jury not only that the person is of unsound mind, but further that the petitioner is a relative, or friend, together with the name, age, sex and residence of the alleged lunatic be ascertained by the jury, appear to us to be manifest; but be this as it may, the legislature has so specifically provided.

As Richard's appointment was void, and there was, therefore, no guardian, the subsequent sale by him was necessarily void and defendant in error obtained no title,

and the general charge for the plaintiff in error should have been given.

Molton vs. Henderson, *supra.*

TO RECAPITULATE.

The statutory process was never issued—Mrs. Simon was actually restrained from appearance, and there was, therefore, no due process of law.

The jury summoned was not of the character prescribed either by the code or the special jury law of Mobile county. Nor was it summoned to try the jurisdictional facts, but only a part thereof.

Nor did either the jury or the court undertake to ascertain or adjudge the truth of the allegations of the petition, but ascertained only one of the several essential allegations.

Respectfully submitted,

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